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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO. —— 523

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

EUGENE MILLER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

JOHN J. STAMOS,
State's Attorney,
County of Cook,
2600 South California Avenue,
Chicago, Illinois 60608,
Attorney for Petitioner.

JAMES B. ZAGEL,
Assistant State's Attorney,
Of Counsel.

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Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois entered in this cause on June 21, 1968.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois is reported in 40 Ill. 2d ——, 238 N.E. 2d 407 (1968) and is printed as Appendix A. The opinion of the Appellate Court of Illinois is reported in 82 Ill. App. 2d 304, 226 N.E. 2d 413 (1967) and is printed as Appendix B.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on June 21, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

May a search and seizure ever be justified by the consent of a person whom a police officer reasonably believes has the authority to consent to the search?

Does Stoner v. California deem per se unreasonable and violative of the Fourteenth Amendment every search by a police officer with the consent of a person whom the officer mistakenly believes has the authority to consent, no matter how reasonable the officer's belief?

CONSTITUTIONAL PROVISIONS

United States Constitution
Fourth Amendment

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Fourteenth Amendment

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

The respondent, Eugene Miller, was indicted for the crime of abortion on February 9, 1965. He was convicted

of that offense by a jury on September 24, 1965. He received a sentence of five to ten years in the penitentiary.*

The evidence at trial is recounted in the opinion of the Appellate Court. (Appendix B) It suffices to say for purposes of this petition that the young woman who was the subject of the abortion, and her roommate testified that respondent had arranged for William Babitsch to perform an abortion which succeeded in terminating the pregnancy but caused substantial internal injuries. Further, an investigating detective testified that respondent said that he and Babitsch split the fee from the abortion and that he himself performed six other abortions. The respondent identified certain surgical instruments found in his car as those used in this line of work.

The introduction of the surgical instruments into evidence (Bill Ex. 272-77)** is the source of the contention brought to this Court.

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*The respondent was jointly tried with William Babitsch who was also convicted. Respondent and Babitsch filed separate appeals to the Appellate Court of Illinois. The Appellate Court affirmed the conviction of Babitsch. People v. Babitsch, 82 Ill. App. 2d 299; 226 N.E. 2d 469 (1967). On review by the Supreme Court of Illinois the conviction of Babitsch was reversed for the erroneous admission of certain physical evidence and for failure to grant a severance. People v. Babitsch, 40 Ill. 2d ——, ——; 238 N.E. 2d 407, 409-10 (No. 40755, 1968). The case of Babitsch is not before this Court.

**The petitioner has certified the entire record in the Supreme Court and Appellate Court of Illinois to this Court. With the exception of the common law record showing indictment, judgment, etc., the only portion of the record that need be considered, and, if the case is taken, printed as an Appendix is the transcript of the motion to suppress evidence. The transcript is quite short and appears at pages 5 through 38d of the Bill of Exceptions.

The respondent filed a pre-trial motion to suppress the surgical instruments. See Illinois Revised Statutes, 1965, Ch. 38, Sec. 114-12. The facts elicited at the hearing on the motion are these:

The respondent was arrested pursuant to a warrant on December 2, 1964 in the foyer of a private home in a suburb west of Chicago. (Bill Ex. 20-21). Respondent, formerly a licensed chiropractor, provided private care to an invalid residing in the house. In light of these services the owner of the house, Mrs. Johnson, allowed him to live there without payment of rent. Mrs. Johnson (apparently the aunt of the invalid) did not restrict respondent's movements in the home. No one room in particular belonged to respondent and he kept his clothes all about the house. (Bill Ex. 10-12)

The officer who arrested respondent at the home spoke to Mrs. Johnson. He asked her who owned the home and she replied that she did. The officer explained his presence and asked for permission to search the house which she granted. (Bill Ex. 21-22) After searching the house the officer asked for permission to search the automobiles in the garage. Mrs. Johnson gave her permission. (Bill Ex. 24-25) The search of a Volkswagen in the garage revealed the presence of a black medical bag containing the medical instruments introduced into evidence at respondent's trial. (Bill Ex. 25-26)

The Volkswagen in Mrs. Johnson's garage, along with another car in the garage, was fitted with license plates registered to Mrs. Johnson. The officer had checked the licenses on the cars in the garage two weeks prior to the date of the search. Both plates on both cars were registered to Mrs. Johnson. (Bill Ex. 27-28) The plate registration was in Mrs. Johnson's name and listed both her first

and last names. (Bill Ex. 35-36). However, it was revealed at the hearing on the motion to suppress that respondent owned the car and had purchased it from a private owner unrelated to Mrs. Johnson. (Bill Ex. 16-17) Respondent gave somewhat confused testimony concerning the license plates saying he didn't recall if he put Mrs. Johnson's plates on his car. He stated that he would not deny putting her plates on his car. (Bill Ex. 18)

The trial court denied the motion to suppress the medical instruments (Bill Ex. 38D), on the basis of the apparent authority doctrine (Bill Ex. 36).

On Appeal to the Appellate Court the respondent argued that the search violated his rights under the Fourth Amendment of the United States Constitution. (Appellate Court Record, Deft's. Br. pp. 17-19) On April 11, 1967, the Appellate Court affirmed on the basis of the doctrine of apparent authority. (Appendix B, App. 12) The respondent petitioned for rehearing arguing that the decision was inconsistent with Stoner v. California, 376 U.S. 483 (1964). The Petition for Rehearing was denied on May 23, 1967. Respondent then sought review in the Illinois Supreme Court claiming that the decision of the Appellate Court was inconsistent with Stoner and other opinions of this Court. (Petition for Leave to Appeal pp. 3-5b) The Illinois Supreme Court granted review and reversed the judgments of the trial and Appellate Courts and remanded for a new trial.* The only stated ground for the reversal of re-

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* Although there is a remand for a new trial the judgment of the Illinois Supreme Court is still a final judgment and may serve as a basis for a Petition for Writ of Certiorari by the State in a criminal case. Miranda v. Arizona, 384 U.S. 436, 498 fn. 71 (1966).

spondent's conviction was that admission of the surgical instruments was inconsistent with the guarantees of the Fourth Amendment as construed in Stoner v. California. (Appendix A, App. 3-4)

REASONS FOR GRANTING THE WRIT

THE IMPORTANT QUESTION OF WHETHER A POLICE OFFICER MAY EVER RELY ON THE CONSENT TO SEARCH OF ONE WHOM HE REASONABLY BELIEVES HAS THE AUTHORITY TO CONSENT IS SQUARELY PRESENTED BY THIS CASE AND SHOULD BE DECIDED BY THIS COURT.

In Stoner v. California, 376 U.S. 483 (1964) the Court said that "rights protected by the Fourth Amendment are not to be eroded . . . by unrealistic doctrines of 'apparent authority'" 376 U.S. at 488.

This language gives rise to two interpretations. Petitioner asserts that "unrealistic doctrines of apparent authority" means that there are some situations in which the doctrine of apparent authority is realistic and acceptable and some situations in which it is not. Stoner involved the latter sort of situation where a hotel clerk consented to the search of a guest's room and where nothing in the record and nothing in the California law (See 376 U.S. at 488, fn. 7) or in common sense would justify an officer's belief that the clerk had authority to consent.

The Supreme Court of Illinois interpreted the language of Stoner to mean that "all doctrines of apparent authority are unrealistic" and ruled, without consideration of the specific facts, that the search of respondent's car was unreasonable, "regardless of the officer's good faith in making the search" (Appendix A, App. 4)

Certiorari should be granted to resolve the question of the proper interpretation of Stoner v. California.

This case presents an especially compelling factual context for the consideration of the apparent authority doctrine. Unlike Stoner, this case involves the case of an officer who enters a private home and secures consent of the undisputed owner to search the home, the garage and the cars in the garage. The respondent lived in the house but, as his testimony revealed, he was not allotted any special room. See Weaver v. Lane, 382 F. 2d 251 (7th Cir. 1967). The case thus presents the classic situation in which apparent authority to consent is upheld, i.e., the consent of a co-occupant and owner of the premises. See People v. Smith, 63 Cal. 2d 779, 799-800; 409 P. 2d 222, 235-36 (1966) cert. den. 388 U.S. 913; reh. den. 389 U.S. 893 (1967) (distinguishing Stoner) People v. Caritativo, 46 Cal. 2d 68, 72-73; 292 P. 2d 513, 515 (1956) cert. den. 351 U.S. 979 aff'd. on other grounds sub nom Caritativo v. California, 357 U.S. 549 (1958) People v. Evans, 249 Cal. App. 2d 764; 57 Cal. Rptr. 836 (1967) People v. Reed, 252 Cal. App. 2d 994, 995-96; 61 Cal. Rptr. 60, 61 (1967).

Further, the police officer had checked the registration of the license plates on the automobiles in the garage and found them listed under the name of the owner of the home and not the respondent.* The reliance of police upon license plates for identification of ownership is widespread. See People v. Henderson, 6 Mich. App. 379, 149 N.W. 2d 258 (1967). Nearly every major city police department publishes a "hot sheet" of license numbers of stolen cars and an officer who fails to stop such a car is subject to discipline. The Chicago Police Department uses a computer to give patrol cars quick information when they check a license. Even irregularities in registration have

* The defendant refused to confirm or deny whether he affixed Mrs. Johnson's plates to his car.

been held to justify an officer's belief that a car may have been stolen. See United States v. Owens, 346 F. 2d 329, 331-32 (7th Cir. 1965). In short, the officer had objective evidence that the car belonged to the owner of the home and, in the absence of indications to the contrary, was justified in believing that she had the authority to consent to the search.

The principal advocate of the doctrine of apparent authority has been Chief Justice Traynor of California. In People v. Gorg, 45 Cal. 2d 776, 782-83; 291 P. 2d 469, 472-73 (1955) Mr. Justice Traynor forcefully stated:

> Defendant was living in the Stevens home, and it is clear that whether he was in fact a tenant, servant, or guest, Stevens believed that he had at least joint control over his quarters and the right to enter them, put them at the disposal of defendant's father, and authorize a search thereof. Under these circumstances the officers were justified in concluding that Stevens had the authority over his home that he purported to have, and there was nothing unreasonable in their acting accordingly. In this proceeding we are not concerned with enforcing defendant's rights under the law of trespass and landlord and tenant, but with discouraging unreasonable activity on the part of law enforcement officers. . . . and when as in this case the officers have acted in good faith with the consent and at the request of a home owner in conducting a search, evidence so obtained cannot be excluded merely because the officers may have made a reasonable mistake as to the extent of the owner's authority.

See also: Traynor, Mapp v. Ohio at Large in the Fifty States, 1962 Duke Law Journal 319, 337; LaFave, Search and Seizure: "The Course of True Law . . . Has Not . . . Run Smooth," 1966 Illinois Law Forum 255, 321.

The essential premise that the exclusionary rule is concerned with "discouraging unreasonable activity on the

part of law enforcement officers" is clearly supported by Mapp v. Ohio, 367 U.S. 643, 651-53, 657, 660 (1961).

The resolution of the problem of apparent authority is very significant to law enforcement. If actual rather than apparent authority is always to be required then a policeman would be well advised to completely abandon the consent search because the risk that some technical concept of property law might void the search is too great. Of course, petitioner advocates the soundness of the apparent authority doctrine but petitioner advocates even more strenuously that this Court resolve the issue and end the uncertainty.

This case is also significant as part of a rising trend in State Courts to decide matters of criminal procedure involving constitutional questions on the basis of applicable federal precedents. The trend is the result of the piecemeal incorporation of certain provisions of the First, Fourth, Fifth, Sixth and Seventh Amendments into the Fourteenth Amendment. Of course, a state court may reach, on the basis of state law, the results required by the United States Constitution and, in the past, they often did. But they do not do so today as the opinion of the Supreme Court of Illinois so clearly shows. The opinion reaches its holding solely on the basis of the Fourth Amendment and the opinions of this Court. The opinion of the Appellate Court of Illinois indicates that, under proper interpretation of federal precedents, Illinois law would not require a reversal in this case. The powerful and ever more pervading influence of this Court on state criminal procedure strongly supports a policy of prompt review by this Court of state decisions rendered under the supposed compulsion of the United States Constitution. The interests of well meaning law enforcement officers, who have no

opportunity to overthrow an onerous decision once it is finally decided against them and who must bind themselves by such decisions, should weigh heavily toward the granting of certiorari in this case.

CONCLUSION

For the reasons given above, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JOHN J. STAMOS,
State's Attorney of Cook County, Illinois,
2600 South California Avenue,
Chicago, Illinois 60608,
Attorney for Petitioner.

JAMES B. ZAGEL,
Assistant State's Attorney,
Of Counsel.

APPENDIX A.

Opinion of the Supreme Court of Illinois. People of the State of Illinois, Appellee v. Eugene Miller, Appellant (No. 40740); People of the State of Illinois, Appellee v. William Babitsch, Appellant (No. 40755) June 21, 1968

KLINGBIEL, Justice.

William Babitsch and Eugene Miller were jointly tried in the circuit court of Cook County by jury and convicted of the crime of abortion. Each defendant was sentenced to the penitentiary for a term of not less than 5 nor more than 10 years. They prosecuted separate appeals to the appellate court and that court, in separate opinions, affirmed the judgments of conviction. We allowed leave to appeal in each case and consolidated the cases for hearing and disposition in this court.

The facts are fully set forth in the opinion of the Appellate Court in People v. Miller, 82 Ill. App. 2d 304, 226 N.E. 2d 413 (see also People v. Babitsch, 82 Ill. App. 2d 299, 226 N.E. 2d 469), and need not be stated at length here. However, a brief summary of the facts is necessary for an understanding of the issues on this appeal. Prior to trial the defendant Babitsch moved for a separate trial on the ground that Miller had made a statement incriminating Babitsch. The court denied the motion and said that in the interest of fairness any reference to Babitsch in Miller's statement would be deleted. The prosecutor said that he might not even use the statement.

The complaining witness, Elaine Grossman, testified that she made arrangements with Miller, who was a friend of her roommate, to have an abortion performed. She testified that Miller said that he could procure the services of a doctor for a fee of $400 and she paid him that amount. Sometime later she re-

ceived a telephone call from a Dr. Williams and a date was arranged for the abortion. The doctor, identified at the trial as the defendant Babitsch, subsequently appeared at Miss Grossman's apartment and performed the abortion.

Thereafter, the defendant Miller was arrested at a private home where he was employed to care for a bedridden invalid. At the time of the arrest, the officer asked the owner of the home if he could search an automobile in the garage. The owner gave her consent and the officer searched the trunk of the car and discovered a bag containing medical instruments and supplies. It was established at the trial that the car was owned by Miller and not by the owner of the house. Defendant Miller moved to suppress this evidence but the motion was denied and the bag and contents were admitted in evidence. The defendant Babitsch objected to the admission of the contents of the bag but the court ruled that the articles were admissible against both defendants.

The officer who arrested Miller testified that he asked Miller if he had committed an abortion on Miss Grossman and that Miller replied, "No. My partner, William Babitsch, performed the operation. But we split the money."

The defendant Miller contends that the articles found in the search of the car should not have been admitted in evidence. The State attempts to support the search of the car on the basis of the consent to the search which was given by the owner of the house. The State argues that she had apparent authority to consent to the search and that therefore the search was reasonable. We agree with Miller's contention that the articles found in the car should have been suppressed. The principal object of the fourth amendment to the United States constitution is the protection of privacy rather than property and the courts have increasingly discarded fictional and procedural

barriers resting on property concepts. (Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, 304, 87 S. Ct. 1642, 1648, 18 L. Ed. 2d 782.) In a somewhat similar situation involving the consent by a hotel clerk to the search of a hotel room, the United States Supreme Court held that the search was unlawful. The court stated, "Our decisions make clear the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of 'apparent authority.'" (Stoner v. State of California, 376 U.S. 483, 488, 84 S. Ct. 889, 892, 11 L. Ed. 2d 856.) Regardless of the officer's good faith in making the search and his reliance upon the consent given by the owner of the house, the fact remains that it was Miller's constitutional right which was at stake. The officer had no warrant for the search and it is not claimed that the search was incident to the arrest. The only justification asserted for the search is the consent of the owner of the house and, as pointed out above, this consent did not waive Miller's constitutional protection against a search of his property. For this reason the judgment of conviction as to Miller cannot stand and the cause must be remanded for a new trial.

The defendant Babitsch argues that the court should have granted a severance because of the incriminating statement of Miller and also that the admission in evidence of this incriminating statement constituted prejudicial error. It is the rule that when a motion for separate trial is based on the fact that a co-defendant's confession implicates the moving defendant a severance should be granted unless the prosecution declares that the admission will not be offered in evidence at the trial, or if offered that there will be eliminated therefrom any and all reference to the party applying for a severance. (People v. Clark, 17 Ill. 2d 486, 490, 162 N.E. 2d 413.) In the Clark case a severance was granted but a confession of a co-defendant implicating the defendant was admitted in

evidence with a cautionary instruction that it should not be considered by the jury insofar as the defendant's guilt was concerned. We held that the admission of such evidence was reversible error in spite of the cautionary instruction. In People v. Smuk, 12 Ill. 2d 360, 146 N.E. 2d 32, a severance had been granted but evidence was admitted of oral statements of a co-defendant implicating the defendant. We ruled that such evidence was highly prejudicial and warranted a new trial. In the present case, Babitsch had requested a severance based upon the possibility that Miller's statement incriminating him might be admitted in evidence. The court denied the request of a separate trial and the very thing which Babitsch had feared occurred. The testimony of the officer that Miller told him that Babitsch performed the abortion was so highly prejudicial to Babitsch that a new trial is required. The State contends that the jury was properly admonished not to consider the evidence. Even if the ruling on evidence on which the State relies could be so construed, the prejudicial effect of the testimony would remain and would be sufficient to require reversal. (Bruton v. United States, 390 U.S. ——, 88 S. Ct. 1620, 20 L. Ed. 2d ——; People v. Clark, 17 Ill. 2d 486, 492, 162 N.E. 2d 413.) Because of the error in admitting this prejudicial evidence the judgment of conviction as to the defendant Babitsch must be reversed and cause remanded for a new trial.

Because this case must be remanded for a new trial we believe it appropriate to consider other claims of error relating to matters which might arise on a second trial. Each defendant complains of the fact that an officer brought out, by implication at least, that the defendants were being investigated for other crimes. Both the court and the prosecutor recognized that this evidence was improper and care should be taken on a second trial to eliminate any possible reference to other crimes having no relation to the present charge.

The defendant Babitsch argues that the contents of

the bag found in Miller's car should not have been admitted as to him. It is the rule that physical evidence may be admitted provided there is evidence to connect the objects found with the defendant and with the crime. There was no showing that the objects found in the bag were used in the abortion, and while it is not necessary to show that an object admitted in evidence was actually used, it is required that the object at least be suitable for the commission of the crime. (People v. Magby, 37 Ill. 2d 197, 202, 226 N.E. 2d 33.) The only testimony as to the nature of the objects found in the bag was the testimony of the arresting officer. He stated as to one instrument that he "believed" that it was a vaginal speculum which was used to hold open the vaginal area of a female. He identified another object as "a tray of some kind", and another as a hypodermic needle. He also identified a bottle of antiseptic and some cotton. As to two other instruments, he stated that he did not know what they were. In his opinion the contents of the bag were not sufficiently identified with the crime to be admissible. Furthermore, they were found in the co-defendant's car and there was a lack of connection established between these objects and the defendant Babitsch. On any subsequent trial these objects should be ruled inadmissible insofar as the defendant Babitsch is concerned.

The defendant Miller claims that it was error to permit the officer to testify that he admitted performing 6 other abortions. It is established that in cases of this character evidence of similar offenses is competent to prove the intent of the accused in performing the act charged. (People v. Stanko, 402 Ill. 558, 561, 84 N.E. 2d 839). We are of the opinion that the testimony that Miller admitted performing 6 other abortions was admissible for the limited purpose of showing intent.

Certain other claims are advanced but they relate to matters that will probably not arise on a new trial.

The judgments of the Appellate Court, First District, are reversed and the cause is remanded to the circuit court of Cook County for further proceedings not inconsistent with this opinion.

Reversed and remanded.

WARD, J., took no part in the consideration or decision of this case.

APPENDIX B.

Opinion of The Appellate Court of Illinois People of the State of Illinois, Appellee v. Eugene Miller, Appellant (No. 51122).

Mr. Justice Burke delivered the opinion of the court.

Eugene Miller was indicted and tried with William Babitsch for the crime of abortion. Both men were found guilty and sentenced to five to ten years in the penitentiary. Eugene Miller appeals. William Babitsch prosecutes a separate appeal.

Defendant raises several grounds for reversal: that the trial court allowed improper and prejudicial testimony by the arresting police officer to be heard by the jury; that the trial court erred in failing to suppress evidence illegally seized by the arresting police officer after defendant's arrest; that the prosecuting attorney engaged in prejudicial final argument; that defendant made a statement to the police without first having been warned of his right to counsel and of his right to remain silent; and that the evidence was not sufficient to prove defendant guilty beyond a reasonable doubt.

The complaining witness, Elaine Grossman, lived in an apartment in Chicago, which she shared with a roommate, Violet Kay Watkins, Eugene Miller's girl friend. In September of 1964, Miss Grossman was fearful that she had become pregnant and Miller, a chiropractor, was consulted. Miller performed a series of tests upon her which confirmed the pregnancy. Miss Grossman testified that she at first attempted to terminate the pregnancy by the use of laxatives and pills provided by her boyfriend. Miller thereafter advised Miss Grossman to have the baby, but later informed

her that he knew two doctors who would perform an abortion. He stated that he could procure the services of the better of the two doctors for the operation and that the fee would be $400, which amount was thereafter paid to Miller by Miss Grossman and Miss Watkins.

In October Miss Grossman received a telephone call from a Dr. Williams and a tentative date for the abortion was set for October 17th. The doctor failed to keep the appointment on the 17th and again contacted Miss Grossman and a date was set for the 21st. On that date Dr. Williams, later identified by Miss Grossman as defendant William Babitsch and who, like Miller, was a chiropractor, came to the Grossman apartment and performed an abortion upon Miss Grossman. Miss Grossman testified that Babitsch inserted a number of surgical instruments which he brought with him into her vagina and, after he had finished, inserted a long flexible tube into the vagina and left the apartment, calling later to inquire about her condition. Both Miller and Babitsch visited the apartment the following evening. Miss Grossman received a series of shots "to speed things up." During the night of October 22nd, Miss Grossman went to the washroom where she discharged a fetus. She preserved the fetus in alcohol as Babtisch directed and later turned it over to him.

Miss Grossman thereafter began to suffer bleeding from the vaginal area and on November 19, 1964, she consulted a physician and was admitted to the Edgewater Hospital. She remained in the hospital for a period of ten days during which time she underwent an operation to remove one of her ovaries and to repair a tear in the uterine wall.

Miss Violet Kay Watkins testified that, at the time he was consulted, Miller stated he knew two doctors who would perform an abortion, that Dr. Williams was the more proficient of the two and that the fee would be in the vicinity of $600, which he later reduced to

$400. After the abortion Miss Watkins testified that she witnessed a tube protruding from the vagina of Miss Grossman and that the latter complained of pain and stated that she was dying and that she wished she would die. The witness further stated Miss Grossman discharged a fetus which Miss Grossman preserved and later gave to William Babitsch.

Eugene Miller was arrested by Detective Frank Collurafici at Miller's place of residence, a private home where he resided while caring for a bedridden invalid person. The home was owned by the invalid's mother, Mrs. Johnson, who also resided there. At the time of the defendant's arrest the officer received permission from Mrs. Johnson to search the house and found the medical instruments which were later admitted into evidence at the trial. Mrs. Johnson further gave the officer permission to search automobiles in the garage. A Volkswagen, bearing license plates registered in the name of Mrs. Johnson, was searched and a black medical bag containing surgical instruments capable of use in an abortion was discovered. Although the Volkswagen was owned by Miller, the officer testified that at the time of the search he believed the automobile belonged to Mrs. Johnson since a prior investigation revealed that the license plates were registered in the name of Mrs. Johnson. The officer further stated that at the time of the arrest Miller told him that Babitsch had performed the abortion upon Miss Grossman; that he and Babitsch had split the $40 fee received therefrom; that he, Miller, performed six other abortions himself; and that the surgical instruments found in his Volkswagen were used in that line of work. A pretrial motion to suppress the instruments as evidence was denied and they were admitted into evidence. At the end of the officer's testimony regarding his conversations with defendant Miller, all testimony relating to William Babitsch was stricken by the court and the jury instructed to disregard it.

Eugene Miller offered no evidence in his own behalf.

Defendant first maintains that the trial court allowed prejudicial testimony by the arresting officer to be heard by the jury. The testimony complained of related to the fact that the officer was assigned to a robbery detail investigating Eugene Miller at the time the officer arrested him on the abortion charge. He also maintains it was error to permit the officer to testify that defendant told him he had performed six other abortions. The record shows defendant was in no way prejudiced in this regard.

Officer Collurafici scrupulously tried to avoid any reference to the fact that he was investigating Miller on a robbery charge after initial objections by defense counsel in this regard were sustained by the trial court and the jury instructed to disregard the references thereto. The officer continued to testify a short while and the trial court finally instructed the jury to disregard his entire testimony. It should be noted that no specific incident was referred to by the officer. Furthermore, the references to the "robbery detail" to which the officer had been assigned were merely collateral to the main line of the officer's testimony. The colloquy between the court and counsel after the references were made, outside the presence of the jury, clearly indicates that the trial court was concerned that the officer's testimony might leave the jury with the impression that defendant was involved in robberies. He was, however, of the opinion that the officer's testimony had no adverse effect upon the jury, but he nevertheless instructed the jury to disregard the testimony. The record discloses that this matter was not deliberately brought out by the State, that the witness tried to avoid references to the matter and the trial judge acted promptly to cure the harm, if any, which might have arisen therefrom. See People v. Naujokas, 25 Ill 2d 32, 182 NE 2d 700.

Defendant's conversation with the officer, that he had engaged in six other abortions, constituted an

admission by the defendant. The officer's testimony was not a conclusion, as defendant maintains; the officer was repeating what defendant had told him and was not rendering an opinion based upon what he heard or observed, as was the situation in the case of People v. Rongetti, 338 Ill 56, 170 NE 14, cited by defendant in support of this position. Furthermore, defendant requested no instruction limiting the effect of this evidence, nor the use to which it could be employed by the jury.

The search of defendant's automobile in the garage and the seizure of the medical and surgical instruments therefrom were reasonable under the circumstances. After Officer Collurafici searched the house, he received permission from the owner and possessor of the premises to search the automobiles in the garage. Having investigated the license plate registration of the Volkswagen some two weeks prior to this time, the officer found that the plates were registered in the name of Mrs. Johnson. Although the Volkswagen was in fact owned by Miller, the officer testified that at the time of the search he thought the automobile belonged to Mrs. Johnson. Under the circumstances we feel that it was reasonable that the officer believed the Volkswagen belonged to Mrs. Johnson and that he acted reasonably in searching the Volkswagen and seizing the black medical bag and its contents.

With regard to the admission into evidence of the medical instruments, the fact that they may not have been the same instruments used in the abortion of Miss Grossman is not controlling. The testimony showed that the abortion had been performed by William Babitsch. There was evidence that Eugene Miller was coconspirator and accessory both before and after the operation by Babitsch. In our opinion the admission of the instruments, without proof that they were the same instruments used on Elaine Grossman was relevant and proper. See People v. Magby, 37 Ill2d 197, 226 NE2d 33.

Defendant next contends that the testimony of Miss Watkins, to the effect that Miss Grossman complained of pain and stated she was dying after the operation, was prejudicial and inadmissible. We disagree. The statements were made by Miss Grossman very soon after the operation was performed and served to corroborate the fact that an abortion had been performed. It clearly does not appear from the record that this testimony was used to arouse the passion of the jury. The statements of Miss Grossman testified to by Miss Watkins are somewhat akin to the complaint of a rape victim as corroborating the fact of the crime. Furthermore, the testimony was not objected to at the time it was offered.

The contention that the prosecuting attorney engaged in prejudicial final argument by referring to the black medical bag and its contents, by stating that Miller was an abortionist, and the like, is without merit. It does not appear that trial counsel transcended the legitimate bounds of proper final argument to the jury. People v. Lloyd, 304 Ill 23, 99, 136 NE 505.

Although defendant raises the argument that he was denied his constitutional rights in that he was not informed of his right to remain silent and of his right to counsel before making statements to the arresting officer, it does not appear that this case presents the proper circumstances under which such a claim may be advanced; Miranda v. Arizona, 384 US 436, is not controlling. See Johnson v. New Jersey, 384 US 719. It further appears that this point was not raised at trial.

Defendant also maintains that the sentence of five to ten years in the penitentiary was excessive, in view of the fact that he was a chiropractor and the fact that he did not perform the abortion upon Miss Grossman. The sentence is within the limits prescribed by the statute and although this Court has the authority to reduce sentences in appropriate cases, nothing in

this record warrants such a reduction. Ill Rev Stats 1965, c 38, Pars 23-1(a), 121-9(b)(4). It also does not appear that, as defendant maintains, the trial judge based the sentence upon any improper evidence. People v. Smith, 55 Ill App2d 480, 204 NE2d 577.

Defendant's final contention is that he was not proven guilty beyond a reasonable doubt. The record in this regard shows this position to be untenable; the State's evidence amply supports the jury's verdict of guilty.

The judgment is affirmed.

Judgment affirmed.

LYONS, P. J. and BRYANT, J., concur.

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No. 523

In the Supreme Court of the United States

OCTOBER TERM, 1968

PEOPLE OF THE STATE OF ILLINOIS,
Petitioner,

vs.

EUGENE MILLER,
Respondent.

MEMORANDUM OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

CHARLES A. BELLOWS,
10 South La Salle Street
Chicago, Illinois
Attorney for Petitioner

JASON E. BELLOWS
SHERMAN C. MAGIDSON
Of Counsel

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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The petitioner here insists on submitting to this Court a question which has been decided in *Stoner* v. *California*, 376 U.S. 483, and *Warden* v. *Hayden*, 387 U.S. 294. The facts of the case clearly indicate that the automobile searched was respondent's. He did not give permission to search the automobile.

In *Warden*, this Court recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and that it has increasingly discarded fictional and procedural barriers resting on

property concepts. 387 U.S. 994, 304. There, this Court was faced with the question of whether a search could be made for "mere evidence". In ruling that such a search could be made, the court made this proviso, "but if [the rejection of the mere evidence rule] does enlarge the area of permissible searches, the intrusions are nevertheless made after fulfilling the probable cause and particularity requirements of the Fourth Amendment and after the intervention of 'a neutral and detached magistrate' *Johnson* v. *United States,* 333 U.S. 10, 14." 387 U.S. 294, 309-310.

Nowhere in the record in this case is there any reason for the absence of a search warrant.

The police officers had obtained a warrant for the arrest of the defendant. They had the opportunity to investigate the license plate registration records of the Secretary of State. The State makes no attempt to justify the search on the basis that it was incidental to a lawful arrest. "Where, as here, officers are not responding to any emergency, there must be compelling reasons to justify the absence of a search warrant. A search without a warrant demands exceptional circumstances, • • •. We will not assume that where a defendant has been under surveillance for months, no search warrant could have been obtained. [A]ll the circumstances bearing upon the necessity to make this search without a warrant are absent from this record. We cannot allow the constitutional barrier that protects the privacy of the individual to be hurdled so easily.

"• • • [N]o reason, except inconvenience of the officers and delay in preparing papers and getting before a magistrate, appears for the failure to seek a search warrant. But those reasons are no justification for by-passing the constitutional requirement • • •." *McDonald* v. *United States,* 335 U.S. 451, 454-455.

In view of the fact that the State was unable to show compelling reasons to justify the absence of a search warrant, because the protections of the Fourth Amendment are aimed at privacy rather than property rights and because this Court has made clear that "the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of 'apparent authority'" *Stoner* v. *California*, 376 U.S. 483, 488, the decision of the Supreme Court of Illinois was squarely in keeping with the decisions of this Court and there are no good reasons for certiorari being granted in this case.

Respectfully submitted,

CHARLES A. BELLOWS
Chicago, Illinois
Attorney for Respondent.